**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

**2014 MSPB 6**

Docket No. DC-0752-11-0872-I-1

**Jessica M. Fox,**

**Appellant,**

**v.**

**Department of the Army,**

**Agency.**

January 29, 2014

Jessica M. Fox, Virginia Beach, Virginia, pro se.

Sandra L. Olivares, Esquire, Alexandria, Virginia, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

## OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that sustained the agency's removal action based on charges of inability to perform the duties of her position and work a regular schedule. For the reasons set forth below, we AFFIRM the initial decision as MODIFIED by this Opinion and Order. The removal action is SUSTAINED.

## BACKGROUND

### Appellant's Accommodation and Leave Requests

¶2 The appellant was employed as a Program Manager, GS-0340-14, at the U.S. Army Corps of Engineers (USACE), Headquarters (HQ), Directorate of Military Programs, Pacific Ocean Division (POD), Regional Integration Team (RIT), in Washington, D.C. Initial Appeal File (IAF), Tab 54 at 15. At all times relevant to this appeal, the appellant's first-line supervisor was Sharon Wagner, Civil Deputy for POD RIT, and her second-line supervisor was Lloyd Pike, Chief of POD RIT. IAF, Tab 55.

¶3 On August 3, 2009, the appellant emailed Wagner a Telework Agreement Request, seeking approval to telework full-time in order to accommodate her medical conditions. IAF, Tab 54 at 18-24. The appellant indicated that she would perform her duties from an alternative worksite in Washington, D.C., or Virginia Beach, Virginia, "while undergoing medical treatments, or until medical conditions improves [sic]." *Id*. at 20. She further stated that "[a]s my medical conditions improve, naturally, I can cut back on the number of Telework days." *Id*. at 18. Wagner did not sign or officially approve the telework agreement, but the appellant was nonetheless permitted to telework full-time for approximately 1 year thereafter. IAF, Tab 65 at 94 (Wagner Declaration).

¶4 By letter dated July 30, 2010, Wagner informed the appellant that she would no longer be allowed to telework full-time because "[t]he essential functions of [her] position are not conducive to teleworking and in fact require that [she] be in the office." IAF, Tab 33 at 104-06. Wagner instructed the appellant to report to her assigned duty station by August 30, 2010, or submit current medical documentation from certified health care professionals supporting her need for telework due to disability. *Id*. By email dated August 18, 2010, Wagner again informed the appellant that, upon submission of appropriate medical documentation, the agency would consider the possibility of establishing an

official teleworking agreement in the future, but reiterated that the appellant was required to physically report to work on August 30, 2010. *Id*. at 103.

¶5 On August 29, 2010, the appellant sent Wagner another Telework Agreement Request. *Id*. at 96-100. She provided medical documentation in support of her request, but with the "caveat" that Wagner not share it with anyone else. IAF, Tab 55 at 3 n.4. The appellant did not report to work on August 30, 2010. *See* IAF, Tab 33 at 94. By memorandum dated November 9, 2010, Wagner informed the appellant that her requested accommodation of full-time telework was denied and that she was expected to return to work on November 22, 2010. *Id*. Wagner noted that the appellant had not allowed her to share the medical information she had submitted with anyone else in the agency for the purpose of determining its applicability to reasonable accommodation. *Id*. Wagner further indicated that full-time teleworking "was not a reasonable accommodation due to the fact that the accommodation would require removal of one or more essential job functions and would cause an undue hardship for the [a]gency to carry out its mission." *Id*. Finally, Wagner informed the appellant that, if she failed to report on November 22, 2010, she would be charged with absence without leave (AWOL) and face possible disciplinary action. *Id*. The attached Denial of Accommodation Request form indicated that the appellant's request was denied because her medical documentation was inadequate and accommodation would cause undue hardship and require removal of one or more essential job functions. *Id*. at 95.

¶6 On November 17, 2010, the appellant requested 232 hours of accrued annual leave and 136 hours of sick leave beginning November 22, 2010, through January 28, 2011. *Id*. at 93. The following day, Wagner authorized the appellant's leave requests for ongoing medical therapy, treatments, testing, and recuperation. *Id*. In a November 23, 2010 memorandum, the agency notified the appellant that because she had used only 16 hours annual leave and 0 hours sick leave since entering her informal telework agreement, and currently had an annual

leave balance of 240 hours and sick leave balance of 127.5 hours, she was no longer eligible for participation in the Voluntary Leave Transfer Program (VLTP). IAF, Tab 66 at 33-34.

¶7 On December 7, 2010, the appellant's representative emailed Pike regarding the VLTP and reasonable accommodation issues and provided additional medical documentation. *Id*. at 36-44. The documentation included an August 25, 2010 letter from Garrett Kelly, D.O., who stated that the appellant suffered from heavy metal poisoning, which dramatically affected her mobility and equilibrium; that she had fallen numerous times as a result; and that she required a wheelchair or cane to move around. *Id*. at 43. Dr. Kelly further noted that the appellant was undergoing heavy metal chelation therapies, which also limited her ability to work away from home. *Id*. Dr. Kelly opined that, although the appellant was currently unable to commute back and forth to work and it was "difficult to determine" when she would be able to return to the workplace, she should be allowed to continue teleworking until her condition improved. *Id*. The appellant also provided an August 26, 2010 letter from Richard Greenberg, M.D., who concluded that the appellant suffered "degrees of depression" and that "it would be in everyone's interest that she continues telecommuting five days per week." *Id*. at 41. In another letter, dated December 3, 2010, Dr. Greenberg stated that the appellant "continues to suffer from a myriad of ongoing debilitating and chronic mental and physical symptoms," but had successfully telecommuted full-time over the past 1.5 years, "proving that her physical presence in the workplace is not only unnecessary in the performance of her duties, but also that she is well-capable of effectively and productively telecommuting medically for extended periods of time." *Id*. at 42. In addition to the letters from her physicians, the appellant provided a December 6, 2010 letter from her chiropractor, Julia Trudeau, D.C., M.T., who essentially reiterated Dr. Kelly's findings. *Id*. at 44.

¶8 In a memorandum dated December 17, 2010, Pike informed the appellant that the additional medical documentation did not change the decision to deny the appellant's request for full-time telework. IAF, Tab 33 at 87. Pike stated that he "must support and reiterate" Wagner's direction and that the appellant was expected to return to work at her duty location in Washington, D.C., on January 31, 2011, when her approved leave ended. *Id.* Pike further indicated that, if the appellant was unable to work, she must properly request leave and provide supporting medical documentation and that, if she failed to return to work or properly request leave, she would be carried in AWOL status. *Id.*

¶9 In an email dated January 28, 2011, the appellant requested an additional 232 hours of accrued sick and annual leave from January 31 through March 11, 2011, for ongoing medical therapy, treatments, testing, consultation, follow-up, and recuperation. *Id.* at 85-86. Also on January 28, 2011, Wagner replied that the appellant was required to report to the office on January 31, 2011, and that she would set up a meeting to discuss the appellant's request for additional leave once she had returned to the office. *Id.* at 85. By email dated January 31, 2011, the appellant responded that she was still unable to return to work for medical reasons and had numerous medical appointments scheduled throughout that day and the following weeks. *Id.* at 81-82. The appellant stated that she had already properly requested leave, per Pike's instructions, and speculated that Wagner was acting in reprisal for having been named as a responsible management official in several equal employment opportunity (EEO) charges against the agency. *Id.* Wagner responded that the appellant had not provided supporting medical documentation reflecting her incapacitation for duty and that her request for leave was therefore not approved, with the exception of February 1 and 2, 2011, for which the appellant was excused due to inclement weather. *Id.* at 80. Wagner further informed the appellant that, due to failure to report to work as instructed, she was charged with AWOL and would continue to be charged with AWOL until she reported to work. *Id.* On February 4, 2011, Wagner emailed the appellant a

memorandum entitled "Notification of [AWOL]," stating that the appellant failed to follow proper leave procedures and that she had failed to submit proper medical documentation showing incapacitation for duty. *Id*.

¶10 On February 10, 2011, the appellant provided Wagner notes from various health care providers covering the period from January 31 through February 9, 2011. *Id*. at 66-76. In a February 16, 2011 memorandum, Wagner explained that the documentation was administratively unacceptable because, with the exception of a February 3, 2011 letter from the appellant's chiropractor, the documents merely indicated that the appellant had an appointment or was under the facility's care. *Id*. at 64-65. Wagner explained what information a medical certificate must contain to be considered administratively acceptable and instructed the appellant to provide such documentation within 15 days. *Id*.

¶11 On March 3, 2011, the appellant submitted additional medical documentation, purportedly showing that she was medically incapacitated from performing duties at HQ, but was medically capable of performing her duties via telework. *Id*. at 54-60. The documents included certifications from six practitioners including Dr. Kelly, Lee Hinnant, M.D., and Eric Madren, M.D. *Id*. In his February 24, 2011 letter, Dr. Kelly briefly stated that the appellant "has severe medical conditions necessitating multiple specialist medical care and an inability to travel to an office based work setting" and reiterated his earlier finding that she was "capable of working from home." *Id*. at 59. In his March 1, 2011 letter, Dr. Hinnant stated that the appellant suffered from gait disturbance, spinal disc degeneration, spinal disc stenosis, chronic lumbago, chronic inflammation, hypertension, and inability to walk unassisted or propel herself in her wheelchair. *Id*. at 55. However, Dr. Hinnant opined that the appellant "was and still is able to perform her work duties remotely by telework and it is medically advisable that she be allowed to do so." *Id*. Dr. Hinnant indicated that the appellant was receiving physical therapy three to five times a week and would undergo a reevaluation on March 31, 2011, after which he would reconsider her

ability to return to the workplace. *Id*. In his March 3, 2011 certification, Dr. Madren stated that the appellant continued to suffer from toxic heavy metal poisoning and that her debilitating symptoms included unstable balance, gait, and equilibrium; chronic muscle weakness, pain, and fatigue; and "the inability to care for herself or to perform the normal and essential daily activities of life without full-time assistance and care." *Id*. at 58. Dr. Madren explained that the appellant could walk only with great difficulty and pain, lacked the physical strength to propel herself in a wheelchair or a walker, and was unable to drive or take public transportation to work. *Id*. He went on to state that, although the appellant "is, has been, and should continue to be . . . medically incapacitated to physically report for duty at her office workplace," she "is, was, and continues to be, medically capable of teleworking from a home-based environment." *Id*. Dr. Madren indicated that the appellant had had positive responses to his latest treatment protocol but that the heavy metal toxicity conditions and symptoms "are expected to continue perhaps a year into the future, since improvements will take time." *Id*. In the interim, he reiterated, "it is highly medically advisable that Ms. Fox be permitted to telework remotely." *Id*.

¶12 On March 8, 2011, the appellant requested 240 hours advance sick leave from March 14 to April 22, 2011. *Id*. at 44-45. She enclosed the same medical documentation she had previously submitted on March 3, 2011. *Id*. at 46-51. On March 17, 2011, Wagner issued the appellant a memorandum entitled "Status of Leave Requests and Referral to Medical Employability Program." *Id*. at 36-37. Wagner stated that the medical documentation the appellant had provided was "contradictory in nature" and that she could not make a determination "as to whether you are truly incapacitated for duty or capable of teleworking from home." *Id*. at 36. Accordingly, Wagner explained, she would be referring the appellant's case to the Federal Occupational Health Service (FOH) Medical Employability Program (MEP) for an assessment regarding the appellant's requests for sick leave and request for reasonable accommodation. *Id*. Wagner

conditionally approved the appellant's requests for earned sick leave, pending a determination by MEP that the appellant was incapacitated, but denied the appellant's request for advance sick leave, citing the appellant's poor attendance record and the "conflicting documentation" she had provided. *Id*. at 36-37. Wagner explained: "I cannot determine if you are incapacitated for duty and I do not have a reasonable expectation you would be able to work consistently for a long enough period of time to repay any leave advanced to you." *Id*. at 37.

¶13 On April 1, 2011, the agency formally referred the appellant's case to MEP, requesting clarification on the following issues: (1) the legitimacy of the appellant's medical documentation; (2) whether the appellant was incapacitated for duty at her permanent duty location in Washington, D.C.; (3) whether the appellant was incapacitated for duty at a remote telework location; and (4) whether a fitness-for-duty exam was necessary and appropriate. IAF, Tab 66 at 12-15. On May 3, 2011, the assigned Occupational Medicine Consultant, Neal Presant, M.D., submitted his findings to the agency. *Id*. at 4-5. Dr. Presant concluded that the medical documentation was genuine and that the appellant was unable to leave her home to work and thus would be incapacitated for duty at her permanent duty station. *Id*. at 5. As for her ability to work remotely, Dr. Presant found that the appellant was only able to work out of her house and that "[e]ven then, her use of sick leave would be very frequent given her many medical problems and need to follow up with many medical specialists." *Id*. He further stated that "[t]here is nothing to indicate that her overall medical condition will be improving in the foreseeable future." *Id*. Dr. Presant stated, moreover, that a fitness-for-duty examination was not warranted as it would be unlikely to provide information beyond that already provided by her health care providers. *Id*.

¶14 After reviewing Dr. Presant's findings, Wagner and Human Resources (HR) Specialist Kelly Smith made efforts to determine whether the appellant could be reassigned to a vacant, fully-funded qualifying position in which she could telework full-time with no temporary duty (TDY) requirements. On May 6, 2011,

Wagner met separately with Lt. Colonel Farrell, Executive Director Military Programs, and Major LeMaster, Assistant Director of Civil Works, to inquire whether there were any vacant, funded positions for which a qualified applicant would be allowed to telework 5 days per week. IAF, Tab 65 at 74, 95. Both indicated that they were unaware of any such positions. *Id*. Subsequently, Wagner held personal conversations with three RIT Civil Works Deputies regarding GS-14 Civil Works Program Manager positions that were being recruited in their units; however, all three indicated that only 1-day-per-week telework arrangements would be considered for the respective vacancies. *Id*. Wagner then contacted Steven Stockton, Director of Civil Works, who informed Wagner that he was not aware of any vacant positions that allowed for 5 days per week of telework. *Id*. Meanwhile, following a review of the appellant's employment history, Smith located fourteen potential vacancies for which the appellant was qualified based on her experience and training as a Program Manager. *Id*. at 102. On May 24, 2011, Smith emailed the relevant HR Staffing Specialists to request that they check with the hiring officials to determine if any of the positions could be performed by a qualified employee teleworking full-time on a permanent basis with no TDY requirements. *Id*. at 75, 102. None of the vacant positions proved to be within the appellant's restrictions. *Id*. at 79-91, 102.

Appellant's Removal and Retirement

¶15 By notice dated June 7, 2011, Wagner proposed to remove the appellant based on her "inability to perform the duties of [her] position and work a regular schedule." IAF, Tab 13 at 11-15. With respect to the latter charge, Wagner noted that the appellant had not worked in a duty status at all in 2011 and had used 237.5 hours of annual leave, 163.5 hours of sick leave, and 375 hours of leave without pay (LWOP) through the pay period ending May 21, 2011. *Id*. at 13. Thus, it appears the appellant's period of AWOL had at some point been

converted to LWOP or another leave status. The notice indicated that the appellant had the right to respond within 15 calendar days from the date of receipt and that a request for an extension of that period would be considered. *Id*. at 14.

¶16 The proposal notice was sent by email, regular mail, and certified mail to the appellant's address of record, a post office box in Virginia Beach. IAF, Tab 33 at 12. The tracking confirmation sheet indicates that notice was left in Virginia Beach on June 15, 2011, but the letter remained unclaimed until June 30, 2011. IAF, Tab 13 at 18. The appellant did not respond to the notice of proposed removal or request an extension of time in which to do so. On July 11, 2011, Pike issued his decision to remove the appellant effective July 12, 2011. *Id*. at 19-21. The tracking confirmation sheet indicates that notice was left in Virginia Beach on July 13, 2011, but the decision letter was not claimed until July 26, 2011. *Id*. at 23. The record includes a Standard Form (SF) 50, with an approval date of July 15, 2011, indicating that the appellant was removed on July 12, 2011. IAF, Tab 16.

¶17 On July 13, 2011, the appellant shipped an Application for Immediate Retirement to the Army Benefits Center (ABC). IAF, Tab 53, Part E at 4, 8-10; IAF, Tab 11 at 7, 66, 68-70. On the advice of an ABC employee, the appellant backdated the application to July 1, 2011, and indicated that her retirement would be effective that same date. IAF, Tab 11 at 7. ABC received the application on July 14, 2011. IAF, Tab 53, Exhibit (Ex.) E at 5-7. On August 3, 2011, the appellant received a letter from ABC, incorrectly dated July 1, 2011, stating that the appellant's retirement application had been processed and forwarded to the Defense Finance and Accounting Service (DFAS) and that her servicing office was now the Office of Personnel Management (OPM). *Id.* at 17; IAF, Tab 11 at 9. The appellant subsequently received a leave and earnings statement from DFAS, indicating that her retirement data had been sent to OPM on July 28, 2011, and that her separation date was July 12, 2011. IAF, Tab 53, Ex. E at 39. OPM

later issued a "Verification of Annuity," dated August 31, 2011, indicating that her annuity had commenced on August 1, 2011. IAF, Tab 53, Ex. E at 34, 37.

Board Proceedings

¶18 On August 11, 2011, the appellant filed an appeal in which she contested her July 12, 2011 removal, but also alleged that she retired involuntarily on July 1, 2011.[1] IAF, Tab 1. In addition, she raised affirmative defenses of due process violations, violations of law, harmful procedural error, retaliation for EEO activity, and disability discrimination (failure to accommodate, disparate treatment, and hostile work environment). *See* IAF, Tab 55. Because the precise nature of the appeal was unclear, the administrative judge afforded both parties an opportunity to address the issue of jurisdiction. IAF, Tab 17. Based on the parties' submissions, the administrative judge found that the appellant had been removed effective July 12, 2011, as recorded on the SF-50, and that the scope of the appeal would be limited to the removal action. IAF, Tab 38. However, the appellant has continued to argue that she is appealing an involuntary retirement in addition to the removal. IAF, Tabs 53, 63, 67, 68; Petition for Review (PFR) File, Tab 1. The appellant initially requested a hearing, but withdrew her request the day before the hearing was scheduled. IAF, Tabs 1, 60.

¶19 In her May 7, 2012 initial decision, the administrative judge found that the agency had proven its charges by preponderant evidence, that the appellant failed to establish her affirmative defenses, and that her removal promoted the efficiency of the service. IAF, Tab 78, Initial Decision. Accordingly, the administrative judge sustained the removal action. *Id*.

¶20 On June 6, 2012, the appellant filed a petition for review, contesting essentially all of the administrative judge's findings and rulings below. PFR File,

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[1] The appellant also checked the box indicating that she was appealing a suitability determination. IAF, Tab 1. She later conceded that the claim "may be premature or inapplicable," IAF, Tab 11 at 14, and she has not pursued it since.

Tab 1. She further claims that the administrative judge gave preferential treatment to the agency. *Id.* Although she has not submitted additional documentation, she claims to have discovered after the close of the record that her former position was still vacant, and she asserts that "[t]his information changes everything." *Id.* at 8-9. The agency has responded. PFR File, Tab 3.

## ANALYSIS

### The administrative judge correctly adjudicated the case as an appeal of the agency's removal action.

¶21 Title 5 United States Code, section 7701(j) provides that "[i]n determining the appealability under [section 7701] of any case involving a removal from the service . . . , neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account." 5 U.S.C. § 7701(j). The essential occurrence in such cases is the timing of the action of the agency, rather than the timing of the grant of retirement by OPM. *Jankowski v. Department of Agriculture*, 63 M.S.P.R. 596, 598 (1994), *modified by Williams v. Equal Employment Opportunity Commission*, 64 M.S.P.R. 436 (1994). As long as an agency effects an action prior to the grant of retirement by OPM, the Board has jurisdiction over the action, regardless of the effective date of the retirement. *Cooper v. Department of the Navy*, 63 M.S.P.R. 600, 602-03 (1994).

¶22 Here, the record contains an SF-50 indicating that the appellant was removed on July 12, 2011. The appellant has challenged the accuracy of the SF-50 on the grounds that her retirement was effective on or before that date. While an executed SF-50 is the customary documentation for a personnel action, it does not constitute the personnel action itself and does not on its face control an employee's status and rights. *Hunt-O'Neal v. Office of Personnel Management*, 116 M.S.P.R. 286, ¶ 10 (2011). Rather, we must look to the totality of the circumstances to determine the date and nature of the appellant's

separation. *See id.* Thus, the administrative judge erred in treating the SF-50 as dispositive evidence that the appellant had been removed. However, the SF-50 is consistent with the decision letter, which provided for the appellant's removal effective July 12, 2011, and there is nothing in the record to suggest that the agency failed to effect that action at the time, even if the SF-50 has since been superseded by a retroactive grant of retirement. Furthermore, the appellant did not file her retirement application until July 13, 2011, the day after her separation.[2] Thus, regardless of the effective date of the appellant's retirement, we conclude the Board has jurisdiction to review the agency's decision to remove her.

¶23 The Board has held that it is error to adjudicate an appellant's involuntary retirement claim as a matter distinct from a removal action. *Williams v. Department of Health & Human Services*, 112 M.S.P.R. 628, ¶ 7 (2009). As we explained in *Scalese v. Department of the Air Force*, 68 M.S.P.R. 247, 249 (1995), if the agency is unable to support its removal action, then the appellant is entitled to all the relief she could receive if she could show that her retirement was coerced, and the involuntary claim would thereby be mooted. Conversely, if the agency is able to show that it properly decided to remove the appellant, then the appellant cannot show that her retirement was involuntary based on the threat of the removal. *Id.* The scope of this appeal is therefore limited to the agency's decision to remove the appellant.

The agency proved the charge of inability to perform.

¶24 In her analysis of the first charge, the administrative judge cited *Slater v. Department of Homeland Security*, 108 M.S.P.R. 419, ¶ 11 (2008), for the proposition that, in order to remove an employee for physical inability to perform, the agency must show that the disabling condition itself is disqualifying,

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[2] The administrative judge stated in error that the appellant filed her retirement application on July 1, 2012. Initial Decision at 5.

its recurrence cannot be ruled out, and the duties of the position are such that a recurrence would pose a reasonable probability of substantial harm. Initial Decision at 16. The holding of *Slater* is derived from OPM's regulation at 5 C.F.R. § 339.206, which concerns disqualifications based on medical history from positions with medical standards or physical requirements or subject to medical evaluation programs. The appellant did not occupy such a position. IAF, Tab 33 at 107-09; *see* 5 C.F.R. §§ 339.202, .203, .205. Consequently, *Slater* does not govern this appeal.

¶25 Where, as here, the appellant does not occupy a position with medical standards or physical requirements or subject to medical evaluation programs, in order to establish a charge of physical inability to perform, the agency must prove a nexus between the employee's medical condition and observed deficiencies in her performance or conduct, or a high probability, given the nature of the work involved, that her condition may result in injury to herself or others. *Marshall-Carter v. Department of Veterans Affairs*, 94 M.S.P.R. 518, ¶ 10 (2003), *aff'd*, 122 F. App'x 513 (Fed. Cir. 2005). In other words, the agency must establish that the appellant's medical condition prevents her from being able to safely and efficiently perform the core duties of her position. *See id.*, ¶¶ 10, 13. In determining whether the agency has met its burden, the Board will consider whether a reasonable accommodation exists that would enable the appellant to safely and efficiently perform those core duties. *See id.*, ¶ 10. However, for the limited purposes of proving the charge, the agency is not required to show that it was unable to reasonably accommodate the appellant by assigning her to a vacant position for which she was qualified; whether it could do so goes to the affirmative defense of disability discrimination and/or the reasonableness of the penalty. *Id.*, ¶¶ 12-14.

¶26 The core duties of a position are synonymous with its essential functions, i.e., the fundamental job duties of the position, not including marginal functions. *See* 29 C.F.R. § 1630.2(n)(1). A job duty may be considered essential for any of

several reasons, e.g., because the reason the position exists is to perform that function, because of the limited number of employees available among whom the performance of that job function can be distributed, or because the function is highly specialized so that the incumbent is hired for his or her expertise or ability to perform the particular function. 29 C.F.R. § 1630.2(n)(2). Evidence of whether a particular function is essential includes, inter alia, the employer's judgment as to which functions are essential, written position descriptions, and the consequences of not requiring the incumbent to perform the function. 29 C.F.R. § 1630.2(n)(3).

¶27 In charging the appellant with inability to perform, Wagner indicated that the following functions are essential to the Program Manager position:

> The main purpose of your job as the POD RIT Program Manager is to coordinate across many functional areas in support of the POD Major Subordinate Command (MSC) Support Team. The Program Manager must personally interact with internal members of the team including but not limited to Real Estate, Counsel, Planning, Operations, and Engineering. The RIT Program Manager plays a key role in preparing summary sheets and issue papers annually for the Chief of Engineers and Assistant Secretary of the Army (Civil Works) ASA(CW) Congressional testimony briefing books for Appropriation and Authorization House and Senate formal subcommittee hearings. This major task includes physically providing hard copies and updates of materials for the binders in preparation for the Chief's testimony. Your position also requires personal interaction with external customers from Alaska and elsewhere in the POD who visit HQ [U.S. Army Corps of Engineers] on a regular basis to discuss their stakeholder issues. The Program Manager also periodically attends meetings with Congressional staffers and national meetings with representatives from other MSCs. The Program Manager is required to remain current on policy and guidance changes in order to effectively serve as an advocate for the MSC, which is difficult to do when not ever physically working with and among your teammates at the office. Failing to perform the portions of your job which must be completed while physically located in the office could have a substantial and negative impact on the POD RIT's projects and programs. These are all essential functions of your job.

IAF, Tab 13 at 13-14. The applicable position description, PD FL121475,[3] confirms that the main duties of the position include "substantial team coordination" among MSC functions, including the ones mentioned in the proposal notice, and that the incumbent "interfaces, both internally and externally" and makes "periodic site visits to MSC and District offices, as necessary." IAF, Tab 33 at 108. The position description also confirms that the Program Manager "[k]eeps abreast of changes in guidance" and "[m]anages, coordinates and participates in the preparation of supporting data, justifications, testimony, information papers, speeches and briefing for the Assistant Secretary of the Army (Civil Works), Chief of Engineers, Director of Civil Works, and others who testify at Congressional hearings in support of Civil Works program." IAF, Tab 33 at 108-09. In addition, the record reflects that there are only three individuals in the RIT among whom these duties could be distributed and that the appellant's physical absence required Wagner to attend overlapping meetings. IAF, Tab 65 at 94, 100. Considering the record as a whole, we find that, with the possible exception of the physical delivery of briefing materials, the duties listed in the proposal notice are in fact essential functions of the appellant's position.

¶28 We next consider whether the appellant could have safely and efficiently performed those essential functions with her requested accommodation of full-time telework. The Equal Employment Opportunity Commission (EEOC) has

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[3] The appellant contends that PD FL121475 was abolished during an agency reorganization and that she is instead covered by PD FL90009. IAF, Tab 67 at 11. Although the administrative judge indicated that she could not locate a copy of PD FL90009 in the record, Initial Decision at 10, it does in fact appear in the record at multiple locations, *see* IAF, Tab 2 at 68-72, Tab 53, Part B at 61-65. Nonetheless, we agree with the administrative judge that the appellant failed to demonstrate that PD FL90009 is the applicable position description. In this regard, we note that PD FL90009 includes a list of the position descriptions it supersedes and that PD FL121475 does not appear on that list. IAF, Tab 2 at 68, Tab 53, Part B at 61. Furthermore, contrary to the appellant's assertions, the MSCs have not been abolished. *See* IAF, Tab 65 at 21-27.

provided the following guidance on whether and to what extent telework may serve as a reasonable accommodation:

> An employer does not have to remove any essential job duties to permit an employee to work at home. However, it may need to reassign some minor job duties or marginal functions (i.e., those that are not essential to the successful performance of a job) if they cannot be performed outside the workplace and they are the only obstacle to permitting an employee to work at home. If a marginal function needs to be reassigned, an employer may substitute another minor task that the employee with a disability could perform at home in order to keep employee workloads evenly distributed.
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> . . . . For some jobs, the essential duties can only be performed in the workplace. For example, food servers, cashiers, and truck drivers cannot perform their essential duties from home. But, in many other jobs some or all of the duties can be performed at home.
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> Several factors should be considered in determining the feasibility of working at home, including the employer's ability to supervise the employee adequately and whether any duties require the use of certain equipment or tools that cannot be replicated at home. Other critical considerations include whether there is a need for face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers is necessary; and whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace. An employer should not, however, deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees. Frequently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.
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> If the employer determines that some duties must be performed in the workplace, then the employer and employee need to decide whether working part-time at home and part-time in the workplace will meet both of their needs. For example, an employee may need to meet face-to-face with clients as part of a job, but other tasks may involve reviewing documents and writing reports. Clearly, the meetings must be done in the workplace, but the employee may be able to review documents and write reports from home.

*Work at Home/Telework as a Reasonable Accommodation*, ¶ 4, U.S. Equal Employment Opportunity Commission, http://www.eeoc.gov/facts/telework.html (last modified Oct. 27, 2005).[4]

¶29 The EEOC guidance suggests that the appellant can perform some of her core duties through telephone and email, and the physical provision of briefing materials is arguably a marginal function that could be reassigned in exchange for other tasks. Furthermore, Dr. Presant's suggestion that the appellant's use of sick leave would preclude useful service from home is contradicted by the opinion of multiple practitioners and also by the fact that the appellant used no sick leave during the period she was permitted to telecommute full-time. *See* IAF, Tab 66 at 12-15, 33-34. However, the essential functions of the appellant's position do require at least some travel and face-to-face interaction, and the agency is not required to modify or eliminate duties that are an essential function of the position. *Johnson v. U.S. Postal Service*, 120 M.S.P.R. 87, ¶ 10 (2013). We therefore conclude that permanent full-time telework would not be a reasonable accommodation.

¶30 Furthermore, the agency has established a nexus between the appellant's medical condition and observed deficiencies in performance. Although the agency has not provided a performance evaluation for the period during which the appellant was permitted to telework full-time, the agency has supplied declarations by Wagner and Pike describing the consequences of the appellant's physical absence. IAF, Tab 65 at 92-100. In her declaration, Wagner stated:

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[4] Although EEOC's guidance does not have the force of law and therefore does not warrant deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it is nonetheless "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), to the extent that its interpretation of the statute it administers has the "power to persuade." *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore*). We find EEOC's interpretation of the Americans with Disabilities Act persuasive and therefore entitled to *Skidmore* deference. *See Solamon v. Department of Commerce*, 119 M.S.P.R. 1, ¶ 9 (2012) (granting *Skidmore* deference to OPM advisory opinion).

> After six months of performing the work of a three person RIT by myself, juggling mandatory meetings and mission execution alone, I was very challenged to continue Ms. Fox's full-time telework. While Ms. Fox worked RIT emails and performed data calls, she did not perform much review and our Congressional justification sheets were critiqued by our leadership as not of high quality which is her purview. As a result, I had to rely heavily on POD personnel located at Fort Shafter to produce more thorough and complete work products from their Districts, which I often did not have time to adequately review for compliance or consistency. When Mr. Owen [GS-14 Planner] came on board I also required his assistance in helping me absorb Ms. Fox's duties as a Program Manager, an area outside of his responsibilities as Planner, and had to cross-train him to perform the work required. Although I attempted to cover all aspects of RIT work, the mission suffered and it was reflected on my performance rating where I was cited for not getting all the RIT work accomplished at a high quality level.

IAF, Tab 65 at 94. In his declaration, Pike states, in relevant part:

> Though Ms. Fox performed some of her programming duties through telework, there were significant deficiencies in POD RIT work products attributable to her prolonged physical absence from work. Specifically, during FY10 the POD RIT received extensive criticism by the Civil Works Directorate for not responding to important correspondence; producing low quality fact sheets that are used to prepare the Chief of Engineers and the Assistant Secretary of the Army for Civil Works . . . and the Chief of Engineers for congressional hearings; and not adequately supporting the Alaska District with liaising when its various active delegations visited Washington to meet with members of Congress to discuss their programs (typically on short notice). These three examples were duties Ms. Fox had successfully performed in the past that were not met while she was out of the HQ office. I recall Ms. Wagner physically running to overlapping meetings, poorly attempting to do the jobs of two people to cover Ms. Fox's absence. Ms. Fox's prolonged telework and absences hindered the team's overall ability to succeed in ways that are more nuanced as well. Simply being available in the office to interact with other team members as priorities and initiatives shift is crucial. It is important to be aware of program dollars that another RIT team cannot expend because an alert and experienced RIT member [may] be able to obtain those dollars to apply to a project within her Region.

*Id*. at 99-100. We find the statements by Wagner and Pike are sufficient to establish that the appellant's absences had a negative effect not only on her own performance, but also on the operations of the RIT as a whole. Because the agency has shown that the appellant's medical condition rendered her unable to safely and efficiently perform all the core duties of her position, we sustain the first charge. *See Marshall-Carter*, 94 M.S.P.R. 518, ¶ 13.

The agency failed to prove the charge of excessive absences.

¶31 We construe the agency's second charge, i.e., inability to work a regular schedule, as a charge of excessive absences. To prove a charge of excessive absences, an agency must establish that: (1) the employee was absent for compelling reasons beyond her control so that agency approval or disapproval of leave was immaterial because the employee could not be on the job; (2) the absences continued beyond a reasonable time, and the agency warned the employee that an adverse action could be taken unless the employee became available for duty on a regular full-time or part-time basis; and (3) the position needed to be filled by an employee available for duty on a regular, full-time or part-time basis. *Cook v. Department of the Army*, 18 M.S.P.R. 610, 611-12 (1984).

¶32 Contrary to the initial decision, we find the agency failed to prove the second element of the charge. The agency notified the appellant on multiple occasions that her failure to return to work or submit acceptable medical documentation in support of her leave requests would result in a charge of AWOL and potential disciplinary action on that basis. IAF, Tab 33 at 64-65, 80, 85, 94. The agency did not, however, notify the appellant that her failure to return to work could lead to discipline even if her absences were approved. Indeed, the appellant could have reasonably inferred from the agency's specific warning about AWOL that she would not face disciplinary action if she submitted sufficient medical documentation and her absences were approved, which is

ultimately what took place. Absent the notice required under *Cook*, the charge cannot be sustained.

The appellant failed to establish her discrimination claims.

¶33 The appellant alleges that the agency discriminated against her on the basis of disability by failing to provide a reasonable accommodation for her disabling conditions and subjecting her to disparate treatment. IAF, Tab 55. In addition, she alleges that the agency acted in reprisal for protected EEO activity. *Id.* The appellant further alleges that she suffered a hostile work environment; however, because the appellant has not alleged that the alleged hostile work environment was a basis for the agency's removal action, as opposed to her decision to retire, we do not address that claim.

*Failure to accommodate*

¶34 The Rehabilitation Act requires an agency to provide reasonable accommodation to a qualified individual with an actual disability or a record of a disability. 29 C.F.R. § 1630.2(o)(4).[5] With exceptions not applicable here, the term "qualified" means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position the individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m). It is undisputed and amply clear from the record that the appellant is a person with a disability as defined at 29 C.F.R. § 1630.2(g)(i). However, as discussed above,

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[5] The Rehabilitation Act incorporates the regulatory standards for the Americans with Disabilities Act (ADA) set forth at 29 C.F.R. part 1630. 29 C.F.R. § 1614.203(b); *see* 67 Fed. Reg. 35732 (May 21, 2002); 57 Fed. Reg. 12634 (Apr. 10, 1992). The ADA Amendments Act of 2008 (ADAAA), which liberalized the definition of "disability," became effective on January 1, 2009, and the amended regulations implementing the ADAAA became effective on May 24, 2011. Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. § 12101 *et seq.*); 76 Fed. Reg. 16978, 17000 (Mar. 25, 2011). Because the appellant's removal took place after the ADAAA and its implementing regulations became effective, we will apply the current regulatory definition of a "qualified individual with a disability." *See* 5 C.F.R. § 1630.2(m).

the appellant cannot perform all essential functions of her position even with reasonable accommodation. Moreover, the record reflects that the agency could not accommodate the appellant by reassigning her to a vacant position for which she was qualified. *See* IAF, Tab 65 at 74-91, 102. Because the appellant is not a qualified individual with a disability under 5 C.F.R. § 1630.2(m), her claim of disability discrimination based on failure to accommodate fails.

*Disparate treatment and retaliation*

¶35 To establish a claim of prohibited employment discrimination or retaliation, in the absence of direct evidence, the employee first must establish a prima facie case. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). The burden of going forward then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its action, and, if the agency does so, the employee must show that the stated reason is merely a pretext for prohibited discrimination or retaliation. *Id*. To establish a prima facie case of discrimination, an employee must show that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination. *Wiley v. Glassman*, 511 F.3d 151, 155 (D.C. Cir. 2007). To establish a prima facie case of retaliation, a claimant must show that: (1) she engaged in a statutorily protected activity; (2) she suffered a materially adverse action by her employer; and (3) a causal connection existed between the two. *Id*. In either case, the burden is not onerous. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

¶36 Although we do not sustain the second charge, the agency has nonetheless articulated a facially nondiscriminatory reason for its action. Accordingly, the inquiry proceeds directly to the ultimate question of whether, upon weighing all the evidence, the appellant has met her burden of proving that the agency intentionally discriminated against her based on disability or retaliated against her based on EEO activity. *See Doe v. Pension Benefit Guaranty Corporation*, 117 M.S.P.R. 579, ¶ 46 (2012); *Marshall v. Department of Veterans Affairs*,

111 M.S.P.R. 5, ¶ 16 (2008). The evidence to be considered at this stage may include: (1) the elements of the prima facie case; (2) any evidence the employee presents to attack the employer's proffered explanations for its actions; and (3) any further evidence of discrimination or retaliation that may be available to the employee, such as independent evidence of discriminatory statements or attitudes on the part of the employer, or any contrary evidence that may be available to the employer, such as a strong track record in equal opportunity employment. *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1289 (D.C. Cir. 1998) (en banc). While such evidence may include proof that the employer treated similarly-situated employees differently, an employee may also prevail by introducing evidence (1) that the employer lied about its reason for taking the action; (2) of inconsistency in the employer's explanation; (3) of failure to follow established procedures; (4) of general treatment of disabled employees or those who engage in protected activities; or (5) of incriminating statements by the employer. *See Brady v. Office of the Sergeant at Arms, U.S. House of Representatives*, 520 F.3d 490, 495 (D.C. Cir. 2008). In determining whether the agency's proffered reason for its action is pretextual, the focus of the inquiry is not "the correctness or desirability of [the] reasons offered . . . [but] rather whether the employer honestly believes in the reasons it offers." *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992).

¶37 With regard to the claim of disparate treatment based on disability, the appellant contends that the agency provided full-time telework for similarly-situated employees. IAF, Tabs 53, 55. For employees to be deemed similarly situated for purposes of a disparate treatment discrimination claim, all relevant aspects of the appellant's employment situation must be "nearly identical" to those of the comparator employees. *Reeves v. U.S. Postal Service*, 117 M.S.P.R. 201, ¶ 18 (2011). To be similarly situated, comparators must have reported to the same supervisor, been subjected to the same standards governing discipline, and engaged in conduct similar to the appellant's without

differentiating or mitigating circumstances. *See Adams v. Department of Labor*, 112 M.S.P.R. 288, ¶ 13 (2009). The appellant conceded during the prehearing conference that the alleged comparator employees were not in the same supervisory unit. *See* IAF, Tab 55. Thus, the appellant has not shown that she was treated more harshly than similarly-situated employees, and she has presented no other evidence to establish that the agency discriminated against her based on her disability.

¶38 With regard to the appellant's retaliation claim, it is undisputed that the appellant filed multiple EEO complaints, as early as 2007 and as recently as March 2011, in which she named Pike as the alleged discriminating official. *Id.* In her March 2011 EEO complaint, she also named Wagner as an alleged discriminating official. *Id.* In her declaration, Wagner asserted without dispute that she first became aware of the EEO complaint regarding herself in March 2011. IAF, Tab 65 at 96. Thus, Wagner did not learn of that EEO activity until after her November 9, 2010 decision to deny the appellant's full-time teleworking agreement. Wagner further averred under penalty of perjury that the appellant's EEO activity was not a consideration in her decision to propose the appellant's removal. *Id.* In his declaration, Pike acknowledged that he became aware of the appellant's EEO activity "long before" Wagner instructed her to physically report to the office. *Id.* at 100. However, he likewise stated under penalty of perjury that the activity was not a factor in his determination to remove the appellant and that he would have made the same decision in the absence of her EEO activity. *Id.* at 100. Based on the evidence of record, we agree with the administrative judge that the appellant has failed to meet her ultimate burden of establishing that the agency intentionally discriminated against her based on her protected EEO activity.

The appellant's removal promotes the efficiency of the service.

¶39 Where, as here, not all of the charges are sustained, the Board will consider carefully whether the sustained charges merited the penalty imposed by the agency. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981). In such a case, the Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). The agency has not so indicated.

¶40 Generally, removal for physical inability to perform the essential functions of a position promotes the efficiency of the service. *D'Leo v. Department of the Navy*, 53 M.S.P.R. 44, 51 (1992). In determining whether removal is an appropriate penalty, the Board will consider whether the appellant could have instead been reassigned to a vacant position within her medical restrictions. *Marshall-Carter*, 94 M.S.P.R. 518, ¶ 14; *see Douglas*, 5 M.S.P.R. at 306 (in determining the appropriateness of a penalty, the Board considers, inter alia, the adequacy and effectiveness of alternative sanctions). However, as discussed above, the record demonstrates that reassignment was not feasible. *See* IAF, Tab 65 at 74-91, 102. Were there a foreseeable end to the appellant's incapacity, her contention that her position remains vacant might also be relevant to the issue of penalty, *see Edwards v. Department of Transportation*, 109 M.S.P.R. 579, ¶ 17 (2008), but the record does not suggest a foreseeable end to the appellant's inability to work away from home. The agency has therefore demonstrated that its action was taken for such cause as will promote the efficiency of the service. *See Marshall-Carter*, 94 M.S.P.R. 518, ¶ 14.

The appellant failed to prove her claims of abuse of discretion and bias on the part of the administrative judge.

¶41 The appellant asserts that the administrative judge abused her discretion by failing to issue a decision within 120 days of the filing of her mixed-case appeal, as required under 5 U.S.C. § 7702(a)(1). PFR File, Tab 1 at 5. While we acknowledge that the Board did not meet the statutory deadline in this case, the delay is attributable in part to the volume of the appellant's pleadings and does not constitute an abuse of discretion on the part of the administrative judge. We further note that, if the Board fails to render a judicially reviewable action within 120 days from the filing of a mixed-case appeal, the aggrieved party may pursue her claim in federal district court. 5 U.S.C. § 7702(e)(1)(B); *Butler v. West*, 164 F.3d 634, 639 (D.C. Cir. 1999). Thus, if the appellant had not waited for this decision, she could have filed a civil action raising her discrimination claims in district court at any time after 120 days of filing her Board appeal. *Cunningham v. Department of the Army*, 119 M.S.P.R. 147, ¶ 3 (2013).

¶42 The appellant also objects that the administrative judge summarily denied her requests for witnesses and motions to compel discovery. PFR File, Tab 1 at 8. An administrative judge has wide discretion under 5 C.F.R. § 1201.41(b)(8) and (10) to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious. *Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985). Moreover, the Board will not reverse an administrative judge's rulings on discovery matters absent an abuse of discretion. *Wagner v. Environmental Protection Agency*, 54 M.S.P.R. 447, 452 (1992), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table). Based on our review of the record, we discern no abuse of discretion in the administrative judge's rulings on witnesses and discovery, and, in any event, the appellant's objections to the denial of witnesses were mooted by her decision to request a decision on the written record.

¶43 In addition, the appellant asserts that the administrative judge failed to address or respond to her objections to the summary of the April 10, 2012 prehearing conference. PFR File, Tab 1 at 5; *see* IAF, Tabs 55, 57. [6] However, the appellant's "objections" consist largely of requests for reconsideration of discovery rulings the administrative judge had already made prior to the conference call, and arguments on the merits that do not contradict the findings and rulings contained in the prehearing conference summary. *See* IAF, Tab 57. Moreover, to the extent the appellant objected to the administrative judge's rulings relating to jurisdiction, these matters were duly addressed in the initial decision. Initial Decision at 6-7.

¶44 The appellant further contends that the administrative judge abused her discretion by failing to address, respond to, or investigate her filings relating to the agency's "intentional, deliberate, and willful misconduct, fraud, tampering and altering evidence, fabrication of evidence, subornation of perjury, perjury, and lack of candor and credibility." PFR File, Tab 1 at 6. She asserts that not only did the administrative judge violate the Rules of Professional Conduct by failing to report the agency representatives to the appropriate state bar, but also

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[6] The appellant further asserts that, in preparing for the prehearing conference, the administrative judge:

> erroneously referenced and based her guidance on [the appellant's] 10 FEB 2012 "Appellant's Pro-Se Pre-Hearing Brief" (Parts A-D), which was filed by Ms. Fox in response to the AJ's Orders of 05 DEC 2011, 09 JAN 2012, 06 FEB 2012, and 08 FEB 2012, which all indicated that Briefs were due by 10 FEB 2012, with a Hearing to be scheduled for MAR 2012 (that was never scheduled), and which was to have addressed the issue of jurisdiction, instead of properly referencing Ms. Fox's 04 APR 2012 "Pre-Hearing Brief" (Parts A-L), which was filed by Ms. Fox in response to the AJ's Orders of 08 MAR 2012 and 15 MAR 2012, which all indicated that Briefs were due by 04 MAR 2012, with a Hearing to be eventually scheduled for 20 APR 2012.

PFR File, Tab 1 at 5-6. This argument is incomprehensible and therefore provides no basis for further review.

the administrative judge should herself be reported to the state bar as a result. *Id.* Based on our review of the record, we find no merit whatsoever to the appellant's allegations of wrongdoing against the agency or the administrative judge in this regard. We also discern no error in the administrative judge's ruling that the agency's February 10, 2010 pleading constituted a timely-filed agency file. *See* IAF, Tabs 33, 42.

¶45 The appellant further objects that the administrative judge erred in referring to the declarations of Wagner and Pike as "sworn statements." PFR File, Tab 1 at 9; *see* Initial Decision at 12-13; IAF, Tab 65 at 92-100. The statements in question are not in fact sworn, but are rather unsworn declarations under penalty of perjury pursuant to 28 U.S.C. § 1746. However, the statute provides that an unsworn declaration under penalty of perjury has the same probative value as a sworn statement. *Id.*; *see Wallace v. Department of Health & Human Services*, 89 M.S.P.R. 178, ¶ 7 (2001). Thus, the appellant's substantive rights were not harmed by the administrative judge's error. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

¶46 Finally, the appellant contends that the administrative judge gave preferential treatment to the agency. PFR File, Tab 1 at 10. In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). An administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). Here, the appellant asserts the administrative judge demonstrated bias by, inter alia, requiring her to resubmit her exhibits, when the administrative judge had not required the agency to do so, and by making a negative inference

based on her request for a decision based on the written record. PFR File, Tab 1 at 10. She further asserts that in 2011 the administrative judge "ruled 0% of the time in favor of the Appellant." *Id.* The alleged inconsistency in pleading requirements is insufficient to establish bias, and the administrative judge did not in fact make an adverse inference or impose any other sanction against the appellant based on the withdrawal of her hearing request. The appellant is mistaken in her assertion that the administrative judge never ruled for an appellant in 2011, *see, e.g.*, *Benjamin v. American Battle Monuments Commission*, MSPB Docket No. DC-315I-11-0874-I-1, Initial Decision (Oct. 21, 2011), and, even if the allegation were true, it would not establish that the administrative judge was biased against the appellant in this case.

## ORDER

¶47 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

## NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of

prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.